

JUL 14 1979

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IN THE
SUPREME COURT OF THE UNITED STATES

No. 77-1771

BARBARA LUSTGARTEN, M.D.,
Petitioner,

v.

FRANK C. BAKER, ET AL.,
Respondents.

**BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI**

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INTRODUCTION:

Worthiness for Review

The "Questions Presented for Review" formulated by Petitioner are not, in fact, presented by the record; there is no conflict between any decision of this Court and those of the courts below; there is no claim of unconstitutionality of any statute or rule; and the factual pattern of the case is highly unlikely to recur: Petitioner sought and received, by order of the Court of Common Pleas of Highland County, Ohio, a special hearing, not on revocation, but on renewal of her medical staff privileges. With the advice and assistance of counsel throughout, Petitioner waived her right to elaborate hearing and review procedures provided by the medical staff by-laws, including, among other pro-

cedural safeguards, thirty days' notice "stating in concise language the acts or omissions with which the practitioner is charged." (Record, Doc. 1, Ex. B, Art. VIII).

The record of the evidentiary hearing, exceeding 700 pages in length, was thoroughly reviewed by both the Court of Common Pleas, sitting as an appellate court, and the Court of Appeals for the Fourth Appellate District of Ohio, and the Supreme Court of Ohio has found that no substantial constitutional question exists. For the reasons stated above and as will be shown below, Petitioner's case is unworthy of issuance of the writ.

STATUTE AND RULE INVOLVED

OHIO REVISED CODE § 513.16

513.16 Removal of hospital governors; duties; term; vacancy; removal.

The joint township district hospital board, as soon as possible after its organization, shall appoint one elector from each township represented and the judge of the court of common pleas of the county in which the joint township hospital district, or the most populous portion of such district lies shall appoint three electors at large from the district, one of whom shall be a doctor of medicine, to constitute a board to be known as "the board of hospital governors" and control the operation of such hospital and perform such other duties as are provided by section 513.17 of the Revised Code, except that, if a lease of the hospital is made pursuant to section 513.171 of the Revised Code, control of the operation of the hospital shall be vested in the lessee thereunder. Each of such governors shall be appointed for a term of three years. Any vacancy shall be filled by an appointment, in like manner, for the unexpired term of the original appointment.

The joint township district hospital board may, by a majority vote of its members, remove any such hospital governor for good and sufficient cause, after a hearing upon written charges.

ART. V, § 3, ¶ B, MEDICAL STAFF BY-LAWS:

Each recommendation concerning the reappointment of a Medical Staff Member and the clinical privileges to be granted upon reappointment shall be based upon such employee's professional competence and clinical judgment in the treatment of patients, his ethics and conduct, his attendance at medical staff meetings and participation in staff affairs, his compliance with the hospital's by-laws, rules and regulations, his cooperation with hospital personnel, his relations with other practitioners and his general attitude towards patients, the hospital and the public.

STATEMENT OF THE CASE

Restatement of both the case and the facts is necessary for the Court to determine whether the questions presented have been properly put by Petitioner. Under the medical staff by-laws, appointment to the staff of Highland District Hospital is made annually. The medical staff had voted 8 to 4 to recommend to the Board of Governors the "nonreappointment" of Petitioner for the 1976-1977 staff year (Transcript of Hearing, at 7). Instead of pursuing her administrative remedies of hearing and review before the medical staff and the hospital governing body, Petitioner filed suit in the Court of Common Pleas of Highland County, Ohio against the hospital administrator and the Board of Governors, individually and collectively, for declaratory and injunctive relief.

The action was filed on May 17, 1976 and nine days later the court, upon the agreement of counsel and the parties, ordered

"that the Board of Governors of the Highland District Hospital . . . receive and hear the recommendations of the Medical Staff and the Executive Committee of the Medical Staff relating to the reappointment of the plaintiff Barbara Lustgarten, M.D. to the Medical Staff of the Highland District Hospital for the year beginning July 1, 1976 and ending June 30, 1977. It is further ordered that said Board of Governors shall conduct a due process hearing and render a decision thereon on or before July 1, 1976. And the Court finds that the plaintiff Barbara Lustgarten has waived all other procedures of the Highland District Hospital as established by the By-laws of the Highland District Hospital as such By-laws now exist." (Emphasis supplied)

Both Petitioner and her counsel personally approved and signed the Judgment Entry, a copy which is set forth in the Appendix.

Commencing June 8, 1976 the Board of Governors conducted the required hearing in ten individual sessions, each approximately three hours in length. Following three additional deliberative sessions, the Board voted, nine to six, Dr. Ayres abstaining, against approval of "Dr. Lustgarten's application for admittance to the Medical Staff of Highland District Hospital for the Medical Staff year commencing July 1, 1976 and ending June 30, 1977." (Transcript, at 737).

On appeal under OHIO REV. CODE § 2506.01 to the Court of Common Pleas, that court affirmed the decision and order of the board. Further appeal was made to the Court of Appeals for the Fourth Appellate District; its

opinion of November 9, 1977 found that "there is in fact such reliable, probative and substantive evidence to justify, if not compel, the Court of Common Pleas to confirm the order of the Board" (emphasis supplied) and the judgment was affirmed. Petitioner's motion to certify the record to the Supreme Court of Ohio was overruled and her appeal to that court was dismissed by order of March 17, 1978 "for the reason that no substantial constitutional question exists herein."

STATEMENT OF FACTS

The issues of notice and opportunity to prepare a defense were not raised by objection to the Board and denial of access to records was not raised or argued on appeal to the Court of Common Pleas. Petitioner requested and agreed to accelerated procedures: the order of May 26th, approved and endorsed by both Petitioner and her counsel, contemplated the participation of Dr. Ayres and at no time was any order of the Court sought with reference either to his removal, discovery as to specificity of charges, or access to records.

"Nonreappointment" was recommended by the medical staff because of,

"... continuous conduct engaged in by Dr. Lustgarten since becoming a member of the medical staff, as follows: failure to adhere to the ethics of the medical profession, inability to work with others; conduct not only towards other members of the medical staff but towards patients and the hospital personnel; failure of compliance with Hospital by-laws and Medical Staff By-laws, rules and regulations; failure to cooperate with hospital personnel; poor relations with other

practitioners and her general attitude towards patients, the hospital and the public." (Transcript at 6).*

After hearing approximately 30 hours of testimony, including that of some 18 pro-Lustgarten or "neutral" witnesses, the clear majority of the Board of Governors determined that the charges against her were justified and that plaintiff ought not be reappointed to the medical staff.

ARGUMENT

Petitioner has not contested the validity or reasonableness of Art. V. § III, * B of the Medical Staff By-laws which provided the standard by which her conduct was measured. (Supra, at 3) Petitioner either waived or failed to raise her sundry procedural objections at appropriate stages of the proceedings, with the single exception of her challenge to Dr. Ayres' seat on the hearing board. Her principal fire throughout has been directed to the participation of Dr. Ayres and it is that question to which argument will be primarily directed.

* The evidence in support of these staff conclusions was placed in four categories for the purpose of argument to the Court of Appeals: (1) medical ethics and unprofessional conduct; (2) medical staff relations; (3) failure of compliance with by-laws, rules and regulations; and (4) relations with other hospital personnel and patients.

In category 1, there was testimony by Drs. J. Raffinan, Hughes, Terrell and Linn as to solicitation of patients by plaintiff, (Transcript at 19, 75, 77, 114, 153 and 178); from Drs. J. Raffinan, Espeleta, Gustin and Terrell and Administrator Baker as to interference with and intervention as to the care and treatment of patients not her own, (Transcript at 14-17, 37, 44, 101, 115 and 393); from Dr. J. Raffinan as to invasion of patient privacy, (Transcript at 18); from Dr. M. Raffinan as to obstruction of transfer of a patient from the service of Petitioner to that of another physician although requested by the patient, (Transcript at 166);

Bias

The presence of Dr. Ayres on the hearing board was contemplated by the May 26th order of the Court of Common Pleas solicited and approved by the Petitioner. She had rejected the normal administrative procedures with successive hearings and appeals for the stated reason that "... if anything, speaking of due process, it gave her too much due process." (Mr. Curren, counsel for Petitioner, Transcript of Argument on Appeal to the Court of Common Pleas, November 30, 1976, at 22).

Although Petitioner objected to Dr. Ayres' participation at the opening of the hearing, she did not seek an order for

and by Dr. Linn as to accusations made by Dr. Lustgarten of "patient stealing" and overcharging by him. (Transcript at 178, 182).

In category 2, relations with members of the medical staff, there was testimony as to failure to meet on staff matters (Transcript at 19, 117), constant agitation for creation of a department to be headed by Petitioner (Transcript at 26, 81, 101-106); uncooperative and uncompromising attitudes and conduct disruptive to proper care of patients, (Transcript at 37, 42, 43), pressures exerted on other physicians in voting on staff matters, (Transcript at 49, 173); characterization of a deceased surgeon as a "butcher" (Transcript at 375); reference to a physician in the presence of his patient as the "Chinese Noodle" (Transcript at 223, 229); insistence on review of overutilization of hospital facilities on a highly selective basis (Transcript at 167); interference with the free conduct of staff meetings by the persistent use of a tape recorder (Transcript at 70, 117) and frequent threats of litigation against those with whom she disagreed. (Transcript at 43, 79, 116).

Testimony on category 3, failure to conform with hospital rules, regulations and by-laws, established "chronic" tampering with and change of operating room and other records (Transcript at 23, 332, 395), prosecution of grievances through irregular channels (Transcript at 29), failure, as medical director of that service, to meet and consult on respiratory therapy matters (Transcript at 60), distribution to unauthorized persons of tape recordings of staff meetings (Transcript at 117); utilizing a portion of the maternity ward for a time as personal living quarters, in violation of public health regulations and resulting in temporary suspension of the hospital's obstetrics license (Transcript at 118, 132), pressures on other physicians to change their diagnosis or opinion on tests, X-rays and tissues (Transcript at 118), pressure on support personnel to depart

his removal by the court which had, pursuant to her request, ordered the hearing by the Board of Hospital Governors of which Dr. Ayres was a statutory member. OHIO REV. CODE § 513.16, provides, among other things, for the appointment of "three electors at large from the district, one of whom shall be a doctor of medicine" and authorizes removal of a member only by the joint township district hospital board "for good and sufficient cause after a hearing upon written charges." The chairman of the board of governors ruled, under the order directing the hearing as well as the statute, that Dr. Ayres should remain as a member of the hearing board.

from safety standards and procedures (Transcript at 119, 388); and refusal to perform emergency room duties. (Transcript at 101, 106, 388).

In category 4, hospital personnel and patient relations, the testimony revealed instances of alarming the family of the patient of another physician (Transcript at 141), upsetting and bullying nurses, nurses aides, laboratory technicians and other support personnel (Transcript at 38, 247, 280, 289-290, 336, 353, 389), by yelling (Transcript at 90, 340), screaming (Transcript at 231), ranting, raving and "hollering" (Transcript at 252), on one occasion intimidating and abusing a nurse on duty in the emergency room by demanding that a statement relating to patient treatment be made on tape ("You call this an emergency? Wait until I get my tape recorder. Now, repeat that!") (Transcript at 259); use of bad language ("Sister, if I ever bawl you out, you will really know it . . . If you expect all the doctors in this hospital to kiss your ass, you have another think coming!") (Transcript at 353), and "Get his butt in the cafeteria right now!" (Transcript at 339); and disturbing kitchen personnel by feeding her dog from the hospital kitchen. (Transcript at 367).

The testimony of Administrator Baker dealt with the various categories, including derogatory entries made by Petitioner in the medical records, e.g. "real brat", making unauthorized changes in operating room records, causing the resignation of an emergency room technician by constant conflict, abuse of the night telephone operator for bothering Petitioner with official calls, discussion of hospital employees with board members directly and outside normal channels of communication, making "blistering" comments on a patient's chart when a change of physician was requested, changing other physicians' medical record dictation and assuming the patient of another physician without permission. Dr. Lustgarten was characterized as "the greatest single negative force in this hospital." (Transcript at 388, 393).

Contrary to *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145 (1968) and *Wheeler v. St. Joseph Hospital*, 63 Cal. App. 3d 345 (1977) where "bias" was either concealed or not revealed until after the hearing, Petitioner, by her presence at the meeting of the medical staff which had recommended her "nonreappointment" and otherwise, well knew of any predisposition against her on the part of Dr. Ayres, yet initiated and agreed to a hearing before the board of which he was a member and sought no stay or supplemental order of the court when the chairman of the hearing board overruled her objection.

It is to be noted that Petitioner's original objection was solely on the ground that "he cannot fairly sit both as an accuser and a Member of the Board." (Transcript at 5). At no time during the hearing was Dr. Ayres charged, either by Petitioner in her own 70 pages of testimony, or by her counsel, with personal animosity, bias or ill-will. Both *Woodbury v. McKinnon*, 447 F.2d 839 (5th Cir., 1971) and *Klinge v. Lutheran Charities Association of St. Louis*, 523 F.2d 56 (8th Cir., 1975), cited until now by Petitioner, hold that prior involvement with and knowledge of the facts do not disqualify a colleague from sitting on a panel which conducts a hearing upon charges against a fellow physician, absent a showing of personal animosity or ill-will.

Dr. Ayres did actively participate in the hearing which was in the form of voluntary statements by witnesses against and in support of Petitioner's application for reappointment, followed by questions as upon cross-examination by both individual board members and by counsel for the Petitioner. At most, Dr. Ayres was permitted to ask leading questions, universally permissible upon cross-examination, and did not present "unsworn testimony" (Petition, at 2) as Petitioner contends. Evidence was adduced on

each side of the issue, not by interrogation in chief by counsel for either side, but by simple statements of witnesses which mode of proceeding made questions on cross-examination entirely appropriate, and at times necessary, to full understanding, particularly with reference to "technical medical situations."

Pecuniary Interest

Much is made of the supposed financial interest of Dr. Ayres. Despite prior intimation to the contrary, it is finally revealed in footnote 12 at page 15 of the Petition that Dr. Ayres was one of three persons administering anesthesia at Highland District Hospital. As noted by the Court of Appeals, the issue of pecuniary interest was raised for the first time upon appeal to the Court of Common Pleas and the record is devoid of testimony "to indicate the extent of Dr. Ayres financial interest." The sole evidence on the point was that Dr. Ayres and Dr. Lustgarten each administered anesthesia; even if bias by reason of possible personal benefit is to be presumed, the case is very different and easily distinguishable from *Gibson v. Berryhill*, 411 U.S. 564 (1973) and *Wall v. Hardwick*, 419 U.S. 888 (1974) where the entire hearing panels had such presumed bias, not one of a panel of sixteen persons as in the instant case.

Petitioner, recognizing this weakness in her position, cites the *Commonwealth Coatings Corp.* and *Wheeler* cases: again, the cases are readily distinguishable: both dealt with arbitration panels, the latter under a consumer "contract of adhesion" compelling arbitration and the former under a provision of the United States Arbitration Act which specifically provides for vacation of an award where it was "procured by corruption, fraud, or undue means" or

"where there was evident partiality in the arbitrators" which was discovered after, not prior to, the hearing.

Court of Appeals

Petitioner's contention that she was denied due process by the Court of Appeals is difficult to take seriously, particularly in view of *Laje v. R. E. Thomason General Hospital*, 564 F.2d 1159 (5th Cir., 1977), review on certiorari having been denied by this Court at its session of June 19, 1978 (No. 77-1527) (46 U.S.L.W. 3778). The Fifth Circuit there found, as did the Court of Appeals for the Fourth Appellate District of Ohio, "that the hearing comported with the procedural requisites of due process . . ." and "that the record contains sufficient evidence to support the denial of privileges."

Quoting its own decision in *Sosa v. Board of Managers of ValVerde Memorial Hospital*, 437 F.2d 173 (5th Cir., 1973), the court concluded by saying "The court is charged with the narrow responsibility of assuring that the qualifications imposed by the board are reasonably related to the operation of the hospital and fairly administered. In short, so long as staff selections are administered with fairness, geared by a rationale compatible with hospital responsibility, and unencumbered with irrelevant considerations, a court should not interfere."

Scope of Charges

The third question presented for review by Petitioner may likewise be dealt with summarily; her privileges were not revoked "solely upon the subjective charges by certain others on the staff that they do not get along with her" (Petition, at 3); rather they were not renewed because of a broad range of unacceptable conduct, not only toward

fellow physicians but, as stated by the Court of Appeals, "toward members of the hospital staff other than doctors and abusive conduct in general" as well as rule violations of which "there was sufficient probative evidence to justify the decision of the board." Petitioner complains "that she is being held to a standard of personal relations higher than is met by others." This charge is not supported by the record and is a statement only of Petitioner's own subjective conclusion.

Politics

Petitioner, in her zeal for allowance of the writ, speaks darkly of persons "the better politically situated" and of "politically connected factions of physicians" (Petition, at 17, 18). At no prior stage of the proceedings was any such allegation made or suggested. It is perhaps to build this inference that Petitioner cites not OHIO REV. CODE § 513.16, placing the responsibility for management in an apolitical board of hospital governors, but § 513.07, which provides for a joint township district hospital board composed of elected township trustees whose function is to "establish, build and maintain a hospital." Whether it is partisan politics to which Petitioner alludes, or politics in the sense of intrigue or strategy on the part of some unidentified faction, is unimportant: neither has factual support in the record.

Due Process and Rights of Others

In this case, as in *Board of Curators of the University of Missouri v. Horowitz*, — U.S. —, 55 L. Ed.2d 124 (1978), assuming the existence of either a "liberty" or "property" interest and regardless of whether clinical deficiency or personal misconduct was at issue, Petitioner

was "awarded at least as much due process as the Fourteenth Amendment requires."

The true issue of the case is whether a Board of Governors may protect other members of a hospital staff from the abusive and unprofessional conduct of a fellow staff member. As rhetorically asked by the Court of Appeals, if the Board of Governors will not afford such protection, who will?

CONCLUSION

The Court of Appeals for the Fourth Appellate District of Ohio correctly affirmed the decision of the Court of Common Pleas of Highland County, Ohio, and review by this Court on writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

**IN THE COURT OF COMMON PLEAS
OF HIGHLAND COUNTY, OHIO**

Case No. 76 CIV 171

BARBARA LUSTGARTEN, M.D.,
Plaintiff,

v.

FRANK C. BAKER, Administrator, et al.,
Defendants.

JUDGMENT ENTRY

(Filed May 26, 1976)

This cause came on on the Plaintiff's motion for preliminary injunction, and upon due consideration thereof and the agreement of counsel and of the Plaintiff, Barbara Lustgarten, M.D., Defendants Frank C. Baker, David S. Ayres, T. J. Belleson, Richard Bowman, Richard L. Griffith, James Gibbs, Wendell Harewood, George Hastings, and Ernest Williamson, it is ordered that the Board of Governors of the Highland District Hospital may receive and hear the recommendations of the Medical Staff and the Executive Committee of the Medical Staff relating to the Reappointment of the Plaintiff, Barbara Lustgarten, M.D., to the Medical Staff of the Highland District Hospital for the year beginning July 1, 1976 and ending June 30, 1977.

It is further ordered that said Board of Governors shall conduct a due process hearing and render a decision thereon on or before July 1, 1976. And the Court finds that the

Plaintiff Barbara Lustgarten has waived all other procedures relating to her reappointment to the Medical Staff of the Highland District Hospital as established by the By-Laws of the Highland District Hospital and the Medical Staff of the Highland District Hospital, as such By-Laws now exist.

The Court further orders that the decision of the Board of Governors of the Highland District Hospital relating to the application for reappointment to the Medical Staff by the Plaintiff herein shall be final and not subject to review. This order supersedes the prior order of this Court.

It is further ordered that the Plaintiff shall pay half of the costs herein, and that the Defendants shall pay the remaining one-half of said costs.

ENTER:

/s/ JOHN C. BACON
Judge, by assignment

APPROVED:

/s/ CONRAD A. CURREN
Attorney for Plaintiff

/s/ ROBT. B. McMULLEN, JR.
Attorney for Defendants

/s/ BARBARA LUSTGARTEN, M.D.

/s/ RICHARD L. GRIFFITH

/s/ E. W. WILLIAMSON

/s/ RICHARD S. BOWMAN

/s/ T. J. BELLESON

/s/ GEORGE HASTINGS

/s/ GEORGE D. WILKIN

/s/ JAMES S. GIBBS

/s/ FRANK C. BAKER

/s/ DAVID S. AYRES

/s/ WENDELL L. HAREWOOD